IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
UNITED STATES OF AMERICA

United States of America,
Ex Rel. Dale Thomas Vosika
and Rob Thompson,

Plaintiffs,

vs.

Starkey Laboratories, Inc.,

Defendant.

Case No. 01-709 DWF/SRN

STARKEY LABORATORIES' REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR DISMISSAL WITH PREJUDICE OF SECOND AMENDED COMPLAINT AND RENEWED MOTION REGARDING STATUTE OF LIMITATIONS

Relators' FCA case depends upon a contract interpretation even more flawed than that struck down by Justice Breyer and the First Circuit as a matter of law in *Data Translation*. Relators' predicate, that *all* of Starkey's 6,000 accounts constitute the Most Favored Customer ("MFC"), is meaningless. Equally flawed is their position that Starkey was required to disclose every discount and price it had ever given any customer, particularly in light of the VA's own contract file. The interpretation upon which relators' case depends is flatly belied by the actual contract documents. As a result, that interpretation fails as a matter of law, requiring dismissal under Rule 12; no amount of discovery can cure this fundamental deficiency.

I. STARKEY IS ENTITLED TO DISMISSAL PURSUANT TO RULE 12(b)(6).

A. Relators Must, But Have Not, Established Falsity As A Matter Of Law.

Any cause of action fails as a matter of law absent each and every essential element of that cause of action. Under the FCA, falsity is an essential element of any claim separate and distinct from the FCA's knowledge requirement. *United States ex rel. Quirk v. Madonna Towers, Inc.*, 278 F.3d 765, 767 (8th Cir. 2002); *United States ex rel. Capella v. United Tech.*

Corp., 1999 WL 464536 at *10 (D. Conn. 1999); *United States v. Rogers,* 2001 WL 818160 at *4 (E.D. Tenn. 2001).[1] Flawed pleading of falsity entitles the defendant to dismissal under Rule 12(b)(6). *First Commercial Trust Co. v. Colts Mf'g Co.,* 77 F.3d 1081, 1083 (8th Cir. 1996) (dismissing claim under Rule 12(b)(6) because plaintiff could not establish an essential element); *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986) (same) .

Because the VA contract does not require that which relators allege, there can be no falsity connected to Starkey's claims for payment, and, therefore, no viable FCA action as a matter of law. *United States v. Data Translation, Inc.*, 984 F.2d 1256, 1267 (1st Cir. 1992) (affirming dismissal of breach of contract and FCA claims because defendant's actions not false under court's contract interpretation). Similarly, the complaint must be dismissed outright despite its allegations of bad acts or fraudulent intent. *See, e.g.*, *United States ex rel. Durcholz v. FKW Inc.,* 997 F. Supp. 1159, 1170-71 (S.D. Ind. 1998) (dismissing FCA claims despite deliberate inaccuracies in documents provided to the government); *Cahill v. Curtiss-Wright Corp.*, 57 F. Supp. 614, 616-17 (W.D. Ky. 1944) (plaintiff must show that defendant submitted a false claim in order to proceed with claim under FCA; charges of deliberate or negligent extravagance and waste do not establish requisite elements of FCA claim by themselves).

B. A Literal Interpretation Of The Contract Imposes Legal Impossibilities.

The VA's solicitation asked Starkey to provide information regarding prices and discounts offered its customers. In response to an 87-page questionnaire, Starkey provided its commercial pricelist and a range of general discounts it offered. [FOIA 000363].[2] Relators' interpretation would have required Starkey to provide detailed pricing and discount information for 6,000 customers for any product that might have ended up on the contract; the VA's official contract file demonstrates no such expectation. Moreover, the resulting Herculean task even had it been required, would have been at odds with the government's goal for MAS contracting--simplifying the government contracting process through competition--and literally impossible to honor. *Data Translation*, 984 F.2d at 1262.

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[1] All unpublished decisions are attached as Ex. C to the Affidavit of Cynthia P. Arends (Arends Aff).

[2] Unless otherwise noted, all GSA, FOIA, and regulatory documents are attached to the Affidavit of Janice M. Symchych, filed with Starkey's initial memorandum.

Because the VA contracting officer neither requested such information nor rejected Starkey's offer due to its obvious absence of such data, there can be no fraud-in-the-inducement as a matter of law. First, there is no falsity under the FCA where there is no obligation to disclose omitted information. *United States ex rel. Berge v. Board of Trustees of the Univ. of Ala.*, 104 F.3d 1453, 1461 (4th Cir. 1997); *United States ex rel. Wilkins v. North Am. Constr. Corp.*, 173 F. Supp. 2d 601, 632 (S.D. Tex. 2001). Second, this fraud-in-the-inducement claim depends upon an interpretive dispute about the nature of the required disclosure. The very need for interpretation to resolve this question, in and of itself, undermines the essential element of falsity. *See Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1477 (9th Cir. 1996) (cost allocation not false where question of how precise or current it "needed to be in light of the statute's imprecise and discretionary language was disputed question").

Relators' response to Starkey's motion recasts their fraud-in-the-inducement claim from one of nondisclosure of all prior customer prices and discounts to one of alleged inaccuracy of Starkey's commercial pricelist. (*See, e.g.*, Relators' Memorandum ("RM") at pp. 6, 8, 10, 14.) In doing so, relators err in equating the commercial pricelist with individual customer pricing. FSS MAS Desk Guide at D1-D4 [GSA 1232-36] (Arends Aff Ex. A). This error demonstrates utter disregard for the regulatory scheme governing MAS contracts, including the essential concept of pricelist "commerciality." 48 C.F.R. § 15.804-3 (1993); FSS MAS Desk Guide at

D1-D9, D13 [GSA 1232-40, 44] (Arends Aff Ex. A). The regulatory scheme expressly differentiates a "commercial pricelist" used in the negotiation process from specific customer pricing, 48 C.F.R. § 15.804-3, and acknowledges that any regularly maintained pricelist distributed to a party's customers will not represent the contractor's best prices because contractors typically offer discounts from such a pricelist. [GSA 1232, 1236-37] (Arends Aff Ex. A). Because relators do not allege that the commercial pricelist submitted to the VA did not satisfy the commerciality test, their fraud-in-the-inducement allegations are facially deficient as a matter of law. Any failure to disclose individual customer prices is legally meaningless, and by definition, not false.

Next, relators falsely aver that Starkey does not claim that it is impossible to comply with the Price Reduction Clause. (RM at p. 20.) Section b. (2) of the clause provides:

> The contractor shall report *all* price reductions made during the contract period to the Contracting Officer along with an explanation of the conditions under which the reductions were made. Those reductions which do not disturb the Government's pricing position relative to the Contractor's identified customer or category of customers will not be subject to the provisions of this clause. However, the information will be used in conjunction with the negotiations for the following contract period.

[FOIA 000494] (emphasis added).[3] Relators' literal reading of this clause *would* indeed have required Starkey to disclose *every* price discount provided *any* customer during the contract period due to their insistence that Starkey's entire customer base be deemed the MFC. [FOIA 000494]. In their memorandum, relators include only the first sentence of the clause (but set forth the remainder almost verbatim). (RM at pp. 3-9.) That selectivity is both troubling and

[3] In their memorandum, relators finally set forth in a pleading most of the contract's actual Price Reduction Clause. Previously, they simply made passing reference to this clause, focusing instead on the language from the SF 26. (*See, e.g.*, Second Amended Complaint ¶ 8; RM at p. 21.) By doing so, relators ignored the critical terms of the Price Reduction Clause itself. Nevertheless, relators' arguments continue to be based on this one sentence from the SF 26 and not the actual Price Reduction Clause read in conjunction with it.

significant because the rest of the clause makes clear that if interpreted as relators suggest, each and every reduction made to *every* customer, over the life of the contract, would have to be both disclosed and explained, *even if the price reduction did not result in a sale below the VA's price.* Such a far-fetched interpretation would make this clause even more onerous than the one struck down in *Data Translation*, which did not include any on-going duty to disclose price reductions.

Relators' interpretation of the Price Reduction Clause sets up an impossible disclosure burden, making their price reduction and rebate claims as flawed as their fraudulent negotiations claim. This is so because the contract nowhere identifies a meaningful MFC. Therefore, as a matter of law, failure either to disclose all pricing or to provide the allegedly required rebates cannot amount to a falsity under the FCA. Lacking falsity, the claims alleged pursuant to the Price Reduction Clause fail as well. *See United States ex rel. Local 342 Plumbers & Steamfitters v. Dan Caputo Co.*, 321 F.3d 926, 932-933 (9th Cir. 2003) (no falsity in failing to pay "prevailing wage" where prevailing wage was not established by contract documents); *see also Tyger Constr. Co. v. United States*, 28 Fed. Cl. 31, 56 n.30, 57 (Fed. Cl. 1993) ("substantial completion" could not be evaluated objectively where contract did not define it).

C. Relators' Literal Interpretation Of The Contract's Requirements Suffers The Same Flaw Justice Breyer Found Unacceptable in *Data Translation.*

Relators' attempt to distinguish *Data Translation* is without merit. *Data Translation,* authored by Justice Breyer while on the First Circuit, is more comparable in its factual underpinnings than any case cited by relators. Relators' own discussion of the case demonstrates just how instructive it is, and why their own case must be dismissed. Relators explain:

> [T]he reason the contract clause at issue in *Data Translation* was subject to practical interpretation *by the court* was clearly a product of the wording of the contract clause itself. The *Data Translation* contract clause was not only vague, but impossible to comply with. *The court* determined that if this vague clause was read literally, it would require the contracting party to provide the government

> with every discount ever provided to any customer during the company's existence. It was only in this context of impossibility that *the court found* that the parties' (sic) could not have intended a literal interpretation of the clause.

(RM at p. 20) (italics supplied, other emphasis in original). Relators have functionally conceded the propriety of deciding the contract interpretation as a matter of law and the reasoning based upon the language of the contract, the factual circumstances presented, and the government's claims. The comparability of each to this case is patent, and calls for the same result.

Although relators admit the pricing clause in *Data Translation*[4] was legally defective, they miss the determinative point that it set forth the very obligation that they seek to impose here. As the government asserted in *Data Translation*, relators' assert here that the contract solicitation required specific disclosure of *each and every* discount Starkey had *ever* given its customers. (Second Amended Complaint ¶¶ 8, 27, 33; *see also* RM at p. 11.) Moreover, Starkey's purported obligation, once the contract had been awarded, to report *every* discount made to *every* customer, *even* if the price reduction did not result in a sale below the VA's price, compels application of Justice Breyer's reasoning. 984 F.2d at 1261. No legally compelling differences exist between the government's claim in *Data Translation* and relators' here.

By contrast, relators' reliance on *Eaton Corp. v. United States*, 591 F.2d 682 (Ct. Cl. 1979), a non-FCA case, is misguided. *Eaton* holds that a *standard* discount given to the vast majority of a contractor's customer base should be considered the contractor's standard commercial price. Here, relators' literal interpretation of the clause requires Starkey to come forward with *any* discount given for *any* reason to *any* customer at *any* time. Similarly, relators' comparisons to *Appeal of Racon, Inc.* fail. GSBCA No. 3628, 1972 WL 1553 (G.S.B.C.A. 1972) (price reduction clause triggered when adjustments made to standard pricelists and catalogues).[5]

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[4] The clause provided: "*If*, subsequent to the award of any contract resulting from this solicitation, it is found that *any price negotiated . . . was increased by any significant amount because the prices, data, and facts were not as stated in the offeror's 'Certificate of Established Catalog or Market Price,' then the contract price(s) shall be reduced* by such amount and the contract shall be modified in writing to reflect such adjustment." *Data Translation*, 984 F.2d at 1258.

Relators are wrong when they argue that this case cannot be dismissed pursuant to Rule 12. The principle of law established by *Data Translation*--that a practical interpretation of a government contract provision must be ordered when a literal interpretation would impose impossible burdens--applies whether in the context of a Rule 12 motion or after a jury verdict. 984 F.2d at 1263. The contract is the contract, whether before or after discovery, or after trial. This Court has the VA's complete contract file, as well as the parties' positions on contract interpretation. This record allows a ready conclusion that relators' literal interpretation of the contract's disclosure requirements and Price Reduction Clause cannot support their FCA claim as a matter of law given the ludicrous ramifications of their interpretation. *See Heaven & Earth, Inc. v. Wyman Prop. Ltd P'ship,* 2003 WL 22680935 at *3 (D. Minn. 2003) (contract construction and effect is a question of law unless contract is ambiguous[6]).

Based upon the parties' negotiations, a practical interpretation of the contract required Starkey to notify the VA of any reductions in its commercial pricelist because this pricelist was central to the parties' negotiations and the ultimate award. Applying this practical interpretation of the contract's requirements leads to but one conclusion--no "false" claim was ever submitted.

D. The Government's Contract File Flatly Contradicts Relators' Literal Interpretation Of The Contract.

Relators incorrectly state that Starkey seems to claim that there was not a meeting of the minds between it and the VA. (RM at p. 7.) Starkey has demonstrated that its representative and the contracting officer were on the same page during negotiations; nothing in the contract file buttresses relators' assertions to the contrary. Indeed, the contract file does the opposite.

[5] Starkey concedes that the Price Reduction Clause would have been triggered if it reduced its commercial pricelist.

With respect to the fraud-in-the-inducement claim, the contract file discloses that Starkey, in response to an 87-page questionnaire, provided general information regarding the broad range of discounts it offered. The file discloses that the contracting officer nonetheless proceeded with the contract, never requiring that Starkey provide the type of detail urged by relators despite being vested with authority to require what she deemed necessary before going further into the process. FSS CH 38-92 [GSA 000725-26]; s*ee also United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 461 (5th Cir. 1977); *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1019 (7th Cir. 1999). She chose not to negotiate from a data base of prior individual customer prices given by Starkey, but instead for a flat percentage off Starkey's commercial pricelist, together with other favorable terms. The contract file proves there was no attempt to do so, and that the concept of commerciality was applied to obviate the need for the type of literal pricing and discount disclosures which relators seek to impose post hoc.

With respect to the Price Reduction Clause claim, the official contract file shows that no MFC designation was ever made, despite the contracting officer's authority to do so at the close of the contracting process. If the VA desired such a designation, it could have done so.[7] FSS CH 38-97 [GSA 001431]. The contract file shows no such designation in any negotiation memoranda or in the Award, which simply refers to Starkeys "dealers (dispensers),"--a legally meaningless category because *all* of Starkey's more than 6,000 commercial accounts fall within

[6] Neither Starkey nor relators claim the contract is ambiguous.
[7] Despite relators' protestations, the Price Reduction Clause and its reference in the SF26 are boilerplate. The clause states generically that "[t]he customer or category of customers upon which the contract award is predicated will be identified at the conclusion of the negotiations." [FOIA 000494]. Indeed, many of the provisions within the clause are written prospectively, setting forth the responsibilities of the contracting officer in going forward to contract award. (*See, e.g.,* Section b. (1) (requiring contracting officer and contractor agree to the pricing relationship between government and MFC prior to the award)). [FOIA 000494]). If the contracting officer, in the exercise of her considerable discretion, chooses not to identify a MFC, this boilerplate clause loses much of its meaning.

this definition. [FOIA 000259]. Although a price reduction clause may designate a "category" of customer as the MFC, agency guidance specifies that this "category" should not be the contractor's entire pool of customers. *See* PIB 89-10 [GSA 000311-12]. Relators again avoid the governing regulatory scheme, and bury their response in a footnote. (RM at p. 3 fn 2.) The holding of *Data Translation* underscores this regulatory precept that a MFC cannot be equated with each and every customer in a situation such as this--where Starkey's entire base of 6,000 accounts were "dealers (dispensers)"--pointing out the virtual impossibility for compliance.

Relators' attempt to prohibit the Court from considering the contract file on grounds that it is parol evidence must be rejected.[8] The argument is incredible when relators themselves rely on the negotiation memoranda. (RM at pp. 3, 13, 19.) Relators' seek to show that Starkey, from its response to the solicitation forward, defrauded the VA while simultaneously attempting to bar consideration of the official VA contract file as a tool to understand the contract. They cannot hide the contract upon which their entire case is predicated as a means of avoiding dismissal. In addition to this irony, relators have again avoided the regulatory authority governing MAS contracts, which clearly indicates that the pre-negotiation memorandum and the price negotiation memoranda are mandatory elements of the government contract file. 48 § C.F.R. 504.803 (1993) (Arends Aff Ex. B). These documents, by agency law, constitute an official government record, designed to memorialize the negotiation process and expectations and objectives of the government. *Id.*; 48 C.F.R. § 15.808. As such, they are hardly "extrinsic." Consequently, the plethora of non-government contracting cases cited by relators for the proposition that evidence outside the four corners of the contract itself is parol evidence and not admissible is irrelevant.

[8] Because relators never actually identify what specific documents they claim are extrinsic or parol evidence, this argument, even if it had merit, is too vague to prevail.

Moreover, where, as here, relators had actual notice of the information contained in documents relied upon by Starkey in its motion and have themselves relied upon them in framing the Complaint, the Court may consider the documents without converting the motion to one under Rule 56. *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47-48 (2d Cir. 1991) (documents filed with SEC but not attached to complaint may nevertheless be considered on 12(b)(6) motion). Therefore, a separate and independent basis exists permitting the Court to consider these documents. *See Venture Assocs. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir. 1993); *Thompson v. Olsten Kimberly Quality-Care, Inc.*, 980 F. Supp. 1035, 1037 n.1 (D. Minn. 1997). Relators were not only aware of these documents, their contents comprise the heart and soul of their Complaint and Starkey's defenses. In addition, the Court has clear authority under the Rules to consider the contract file by merely converting the motion to one for summary judgment under Rule 56. Fed. R. Civ. P. 12(b) (2004). There should be no viable argument that the official VA contract file cannot provide a dispositive basis for the contract interpretation, which is a threshold question determining whether this lawsuit can proceed.

II. THE STATUTE OF LIMITATIONS BEGINS TO RUN EACH TIME A CLAIM IS MADE, NOT FROM THE LAST PAYMENT MADE UNDER THE CONTRACT

Relators' reliance on *TS InfoSystems, Inc. v. United States*, 36 Fed. Cl. 570, 573 (Fed. Cl. 1996), in support of their argument that the limitations period does not begin to run until the last payment is made, is misguided. The case has never been relied upon by any court facing a FCA claim based upon a MAS contract. Relators' reliance on *Allen v. Beta Constr.*, 309 F. Supp.2d 42 (D.D.C. 2004) for the proposition that *TS InfoSystems* is "authoritative" is also misguided because *Allen* involved sixteen different installment contracts. *Id.* at 44. Here, there is one contract requiring Starkey to offer specific prices, but each order under a MAS contract is a new transaction. Cases such as *United States ex rel. Kreindler & Kreindler v. United Tech. Corp.*, 985 F.2d 1148, 1157 (2d Cir. 1993) are more on point and dictate a different result. Starkey does not dispute that it entered into a contract which resulted in a series of transactions; such is the inherent nature of a MAS contract. The prevailing view is that each separate transaction triggers the running of the statute of limitations.[9] (Starkey's Reply Memo dated 12/15/03 at pp. 14-16.) Because relators' First Amended Complaint (the first complaint served on Starkey) was filed December 17, 2001, any claims submitted prior to December 17, 1995, are time-barred.[10]

CONCLUSION

For the reasons stated in Starkey's briefing, the Court must dismiss Relators' Second Amended Complaint with prejudice pursuant to Rule 12(b)(6).

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Dated: July 9, 2004.

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[9] That each false or fraudulent claim is considered separately under the FCA is in fact consistent with relators' Complaint wherein they allege that each claim for payment by Starkey is a separate violation of the FCA, entitling them to a separate penalty. (Second Amended Compl. ¶ 35). Relators cannot have it both ways.

[10] Although relators contend that their original Complaint tolled the statute of limitations, they have failed to establish that their First Amended Complaint relates back to it because that complaint remains under seal. *See, e.g., In re Asbestos Sch. Litig.*, 768 F. Supp. 146, 151 (E.D. Pa. 1991) (plaintiff must produce evidence establishing subsequent pleading relates back to earlier pleading.). Thus, through relators' own fault, there is no record upon which Starkey and the Court are able to analyze the accuracy of their argument.